No. 80-1314

MAR 23 1981
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1980

ELWOOD NADER,
Petitioner,

vs.

CABEL B. McBRIDE,

and

THOMAS J. ESCOVAR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, THOMAS J. ESCOVAR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

Petitioner Elwood Nader filed a Complaint in the Court of Common Pleas of Cuyahoga County, Ohio alleging that the Respondent, Thomas J. Escovar, had maliciously and negligently filed a medical malpractice action against him. Respondent filed a Motion to Dismiss the Complaint, or, in the Alternative, Motion for Summary Judgment pursuant to Rule 12(B)(6) and Rule 56 of the Ohio Rules of Civil Procedure. In support thereof, Respondent annexed an Affidavit to the Motions which established that the Respondent was an attorney at law, licensed to practice in the State of Ohio; that he was retained by Cabel Mc-

Bride in December, 1975 to represent him in connection with a malpractice action against Dr. Elwood Nader; that the one-year statute of limitations for bringing such action was about to expire; that he concluded there existed a possible malpractice action against Dr. Nader; that in filing the action against Dr. Nader, he did not act maliciously, but with probable cause to believe an action existed against him; and that he did not at any time cause seizure of either the person or property of Dr. Nader. The Affidavit further established that two months after the Respondent filed the action against Dr. Nader, the representation of Cabel McBride was assumed by other counsel and that the Respondent withdrew as counsel for Mr. McBride. The Affidavit further established that the action against Dr. Nader was dismissed by successor counsel on June 20, 1977, over 16 months after the Respondent withdrew as counsel for Mr. McBride, and was dismissed without the knowledge of the Respondent.

Petitioner did not file any Affidavit nor offer any evidence in contradiction to Respondent's Affidavit or evidence.

Based upon the evidence and the legal authorities cited in the briefs of the parties, the trial court was compelled to grant summary judgment to the Respondent. This decision was affirmed by the Ohio Court of Appeals (Eighth Appellate District). The Ohio Supreme Court dismissed Petitioner's appeal, finding that the case presented "no substantial constitutional question."

Petitioner has now requested this Court to grant a Writ of Certiorari on the ground that his constitutional rights have somehow been violated. It appears that the Petitioner claims that he has been deprived of a property right without due process of law, and that he was deprived of a right to trial by a jury.

REASONS FOR DENYING THE WRIT

THE PLEADINGS AND THE EVIDENCE BEFORE TRIAL COURT SHOWED THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THIS RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

I. The Petitioner filed a Brief in Opposition to this Respondent's Motion for Summary Judgment, but presented no specific facts by Affidavit or otherwise to show there was a genuine issue for trial. Ohio Rule of Civil Procedure 56(E), which is identical to Federal Rule of Civil Procedure 56(e), provides, that when a motion for summary judgment is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations of his pleadings, but his response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. This provision of Rule 56(E) was particularly applicable in this case, and accordingly, the trial court granted summary judgment against the Petitioner. This provision of Rule 56(E) has been adverted to by the courts on numerous occasions in ruling upon motions for summary judgment. Hence, in the recent Ohio case of *Harless v. Warehousing Co.*, 54 Ohio St. 2d 64 (1978), the Supreme Court of Ohio stated at page 65:

> "Given the requirement of Civ. R. 56(E) that a party set forth specific facts showing that there is a genuine issue for trial, that party must so perform if he is to avoid summary judgment. *State, ex rel. Garfield Hts. v. Nadratowski* (1976), 46 Ohio St. 2d 441, 442-43, 349

> N.E. 2d 298. Unsupported allegations in the pleadings do not suffice to necessitate the denial of a summary judgment. The principal function of Civ. R. 56(E) is to enable movement beyond allegations in the pleadings, and to analyze the evidence so as to ascertain whether an actual need for a trial exists."

The courts have repeatedly stated that the purpose of Rule 56 is to allow the trial court to dispose of the case in advance of the hearing on the merits. The objective is to separate the sham and insubstantial from the real and genuine issues of fact.

II. Petitioner's Complaint alleged that this Respondent had maliciously and negligently filed a medical malpractice action against him. Cases of this nature have been brought with increasing frequency in recent years, and have become commonly known as "physicians' countersuits." The cases have been brought throughout the United States on various theories or grounds, and have met with a singular lack of success. *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821 (1978); *O'Toole v. Franklin*, 279 Ore. 513, 569 P.2d 561 (1977), and cases cited therein. (Also see cases cited in the Opinion of the Ohio Court of Appeals [Eighth Appellate District] that is set forth in the Appendix of the Petition for a Writ of Certiorari filed in this case.) It was clear from the Affidavit of this Respondent attached to the Motion filed in the trial court that he did not act with malice, nor did he act without probable cause. Moreover, the case was dismissed by successor counsel, not by this Respondent. Inasmuch as the elements of malice and lack of probable cause were missing, the case could have been dismissed upon those grounds alone. There is an additional ground, however, upon which the lower court was constrained to dismiss the case. In a long line of cases, beginning with *Cincinnati Tribune Company v. Bruck*, 61 Ohio St. 489, 56 N.E. 198 (1900),

Ohio has chosen to follow the English or special injury rule that in order to maintain an action for malicious prosecution, there must be an arrest of the person or a seizure of his property. In this case, the only evidence before the court established that there was no seizure or arrest of the person or property of the Petitioner arising out of the original civil action filed against him. Thus, his action was not cognizable under the laws of Ohio, and the trial court properly granted this Respondent's Motion.

The purpose of the English or special injury rule is to strike a balance between allowing free access to the courts for the vindication of rights and the undue exercise of such a right. Petitioner's argument, if accepted, would upset that delicate balance. Free access to the courts to settle disputes is a fundamental component of a judicial system. As a result, access should not be inhibited by fear of retaliatory lawsuits. To permit such retaliatory lawsuits would increase rather than decrease the amount of litigation. Where would the retaliation stop or does it continue *ad infinitum*? If so, litigation would truly become interminable and the strain on the judicial system would be devastating.

SUMMARY JUDGMENT PROCEDURE UNDER CIVIL RULE 56 DOES NOT INFRINGE UPON A LITIGANT'S RIGHT TO A JURY TRIAL.

Prior to the adoption of the Federal Rules of Procedure, this Court held that summary judgment procedure did not infringe upon the constitutional right of a party to a trial by jury. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902). Since the adoption of Federal Rule 56, whenever the issue of constitutionality has been raised, the courts have unanimously held that Rule 56 does not deprive a party of a jury trial. Once

the court determines that there are no disputed material facts for a jury to try, it may enter a judgment, and by so doing does not infringe upon the litigant's right to a jury trial. See 6 MOORE'S FEDERAL PRACTICE, ¶ 56.06[2]; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil Section 2714; 32A O. JUR. 2d *Judgments* Section 886 and cases cited therein.

In view of all of the above, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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